

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MICHAEL H. KALINER, as Chapter 7 Trustee for :
BARRON ATM, LLC, :

Plaintiff, :

v. :

MT. VERNON MONETARY MANAGEMENT :
CORP. d/b/a MVMM CORP., MT. VERNON :
MONEY CENTER CORP. d/b/a MVMC :
CORP., and BARRON ATM CORP., :

Defendants. :
-----X

Civil Action No.
07 Civ. 4643 (LMM)

**REPLY DECLARATION OF KAREN F. LEDERER IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

Now comes Karen F. Lederer, and declares as follows:

1. I am a member of Troutman Sanders LLP, attorneys for Defendants MVMM Corp. (incorrectly named in the Complaint as "Mt. Vernon Monetary Management Corp. d/b/a MVMM Corp."), Mount Vernon Money Center Corp. (incorrectly named in the Complaint as "Mt. Vernon Money Center Corp."), and Barron ATM Corp. I make this Declaration in support of Defendants' motion to dismiss the Complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure for failure to plead fraud with particularity and for failure to state a claim upon which relief can be granted.

2. In opposition to our motion to dismiss, Plaintiff attached two pages from a deposition of Robert F. Egan taken on April 26, 2007 by Mr. Wolman, the attorney for Plaintiff in this case. That deposition was taken by Mr. Wolman in the Barron LLC bankruptcy proceeding. Defendants do not believe that it would be fair or appropriate for the Court to convert this motion

to dismiss into a motion for summary judgment based upon Mr. Wolman's introduction of documents outside the pleadings. To do so would give Plaintiff an unfair advantage since Plaintiff has already conducted discovery in the bankruptcy proceeding and Defendants, of course, have not had an opportunity to conduct any discovery in this case.

3. The Complaint asserts four claims against each of the Defendants: breach of contract, quantum meruit, unjust enrichment, and fraud. As set forth below, (i) Plaintiff cannot state a claim for breach of contract against the Mount Vernon Defendants since Plaintiff in his opposition to the motion acknowledges they were not parties to the alleged contract, and Barron Corp. is not an alter ego of the Mount Vernon Defendants, and (ii) Plaintiff has not stated a claim for fraud, because Plaintiff has not alleged a misrepresentation that is not duplicative of a contract claim, and in addition the alleged misrepresentations are either nowhere to be found in the Complaint or are totally implausible in view of Plaintiff's other statements in this matter.

4. Defendants agree that Plaintiff should be permitted, for now, to maintain his quantum meruit and unjust enrichment claims as alternatives to his breach of contract claim, because Defendants will in answering the Complaint plead that the document Plaintiff refers to as the contract is only an offer letter, and, in fact, the parties never reached an agreement.

5. Attached hereto as Exhibit "A" is page 70 of the deposition of Richard Miro taken by Mr. Wolman in the Barron LLC bankruptcy proceeding on February 1, 2007 (the "Miro Dep.").

6. Attached hereto as Exhibit "B" are pages 60-67 of the Miro Dep.

7. Attached hereto as Exhibit "C" are pages 103-115 of the Miro Dep.

8. Attached hereto as Exhibit "D" are pages 24-25 of the Miro Dep.

9. Based on the foregoing and the attached exhibits, the Defendants respectfully request that the motion be granted.

6. Signed under the penalties of perjury this 10th day of October, 2007.


KAREN F. LEDERER

EXHIBIT A

1 R. Miro

2 certificate, right?

3 A Correct.

4 Q Now, you'll see on page 3 of
5 the certificate, which is the actual
6 fourth page of the exhibit --

7 A Okay.

8 Q -- there is a filing stamp on
9 the right-hand margin, it says "Filed
10 2002, September 12th."

11 A Correct.

12 Q Okay. Does that comport with
13 your understanding of when the
14 corporation was filed?

15 A Correct.

16 Q Okay. And in and around that
17 time, were you asked to set up any books
18 of account for Barron ATM Corp.?

19 A Yes.

20 Q Was it around this time in
21 September of '02?

22 A In and around that time.

23 Q And at the time you set up the
24 books, was there any opening balance for
25 the company on the books?

EXHIBIT B

1 R. Miro

2 Q Do you know who the other
3 50 percent was for the second company?

4 A COAC was Joseph Collins was
5 the other owner and GNC Payroll Plus was
6 Nancy Caccavale.

7 Q There were just two owners?

8 A And Bob -- I don't recall what
9 the percentages were at that time.

10 Q So in each of these companies,
11 Bob Egan was the sole owner or had one
12 partner?

13 A Correct.

14 Q Okay, now, when you managed
15 the finances or the accounting for
16 Barron ATM Corp., did the company, I'll
17 just use the name Barron ATM Corp., have
18 income that was deposited directly into
19 its account?

20 A Yes.

21 Q And where did that income come
22 from?

23 A It came from the ATM machines.

24 Q Okay.

25 A Surcharges, there were

1 R. Miro

2 surcharges.

3 Q If you could tell me just
4 again briefly so I understand how the
5 business worked and what monies actually
6 came in. Okay?

7 A There were surcharge fees
8 which are associated with an ATM
9 machine, which is when a customer
10 withdraws cash they are charged a
11 surcharge anywhere from a dollar to \$2,
12 depending on our discretion what the
13 market would bear, and also there is an
14 interchange fee as paid by the network.

15 Q That's the banking network?

16 A The ATM banking network pays
17 an interchange fee to the ATM owners.

18 Q Okay. So that would be a fee
19 that --

20 A That would be what Barron ATM
21 Corp. received, yes.

22 Q Any other charges?

23 A Revenue.

24 Q Yes.

25 A Yes, that would be it.

1 R. Miro

2 Q That's it?

3 A Yes, that's it.

4 Q Now, out of that revenue did
5 Barron ATM have expenses associated with
6 it?

7 A Yes.

8 Q And could you describe what
9 those expenses are?

10 A Sure. They would have to pay
11 the network, there would be a fee, a
12 transaction fee, that you would pay the
13 ATM network to process your account,
14 your transactions. There would be
15 telephone charges because there are
16 telephone lines associated with each and
17 every machine, there was the cost of the
18 purchase, there was maintenance of the
19 machines.

20 Q When you say cost of the
21 purchase, you mean the purchase price of
22 the sale transaction with Barron ATM,
23 LLC?

24 A That is correct, commissions
25 to the store owners that the machines

1 R. Miro

2 were located at. There were -- did I
3 say maintenance costs associated with
4 the machine?

5 Q Yes.

6 A There's also paper that needed
7 to be put in the machine, there was
8 insurance on the machines, there was the
9 cost of cash to put the money to the
10 machines, another cost was the cost to
11 put the money into the machines
12 themselves through the cash service
13 provider, Mt. Vernon Money Center,.

14 Q Okay. Now, out of the
15 customer transaction fee, which is the
16 term I'm using to describe the dollar to
17 \$2?

18 A The surcharge.

19 Q The surcharge. The customer
20 would pay to get his money, and the fee
21 you said the network paid to Barron ATM
22 Corp.?

23 A Yes.

24 Q What monies, if any, came
25 directly to Barron ATM Corp. to be

1 R. Miro

2 deposited?

3 A I don't recall if it went
4 directly to the Barron ATM Corp. account
5 or if it went to Mt. Vernon Money Center
6 as the managing company. Because Mt.
7 Vernon Money Center had ATM machines
8 also. So I think just to facilitate the
9 process they had to come into one
10 account, I don't recall if it was
11 segregated or not at that time. But
12 there was a segregation with respect to
13 the accounting of those funds. Those
14 machines, the surcharge and interchange
15 fees that came in on behalf of Barron
16 ATM Corp., there was a segregation.

17 Q And when you say a
18 segregation, do you mean a separate bank
19 account?

20 A I think there was a separate
21 accounting.

22 Q Was there a book account kept,
23 a ledger?

24 A Yes, they were recorded on Mt.
25 Vernon's books and Barron's books.

1 R. Miro

2 Q And out of the monies that
3 were received as income, how were
4 expenses paid?

5 A Expenses were paid I think
6 Barron -- let me just see something. I
7 think the checks -- I think the expenses
8 were paid through Mt. Vernon Money
9 Center on behalf of Barron ATM Corp.,
10 and again a separate accounting was made
11 on both books.

12 Q Do you recall whether Mt.
13 Vernon Money Center paid expenses for
14 Barron ATM Corp. out of money that was
15 booked into Barron ATM Corp's account?
16 In other words, out of whatever it had a
17 positive balance for on your books or
18 whether Mt. Vernon just paid those
19 expenses and reconciled later?

20 A Mt. Vernon paid the expenses
21 on behalf of Barron ATM Corp. and they
22 charged it to a Barron ATM account from
23 an accounting point of view.

24 Q Did they do so whether or not
25 there was adequate cash credited to

1 R. Miro

2 Barron ATM Corp. to cover the payment?

3 A They were making the payments
4 at the time to cover the expenses.

5 Q Whether or not there was
6 enough income received from Barron ATM
7 Corp's account?

8 A Correct.

9 Q Is that right?

10 A Correct.

11 Q And were there times when Mt.
12 Vernon Money Center made those payments
13 even though there was no cash available
14 from Barron ATM Corp. to make the
15 payment?

16 A Repeat that.

17 Q Did indeed Mt. Vernon Money
18 Center make payments for Barron ATM
19 Corp.'s expenses at times when there was
20 no positive balance credited to Barron
21 ATM Corp. on the books?

22 A Mt. Vernon would pay the
23 expenses on a monthly basis, yes.

24 Q So it would cover expenses at
25 times when there was not enough money

1 R. Miro

2 credited to Barron ATM Corp. for those
3 payments, right?

4 A I guess Mt. Vernon would pay
5 for them, yes.

6 Q When you made payments on the
7 account of the purchase transaction, as
8 we discussed 1 through 26, specifically,
9 for the payments that you said were made
10 out of a Barron ATM Corp. account --

11 A Yes.

12 Q -- how did the money get
13 deposited to that Barron ATM Corp.
14 account?

15 A Mt. Vernon would fund it, they
16 would physically have cash transferred
17 into the account.

18 Q Specifically, for those
19 payments --

20 A Correct.

21 Q -- on the purchase price?

22 A Yes.

23 MR. WOLMAN: Off the record.

24 [Discussion held off the
25 record.]

EXHIBIT C

1 R. Miro

2 you see a Comnet 3000, above you'll see
3 the same number next to it. It's sort
4 of a key.

5 Q Just describing the cost of
6 each machine and each upgrade for those
7 machines?

8 A Right.

9 Q Thank you.

10 MR. WOLMAN: Could you mark
11 this as the next exhibit, please, as
12 Exhibit I.

13 (MV Exhibit I, Baron ATM Income
14 Statement 2004 marked for
15 identification, as of this date.)

16 Q Mr. Miro, I'm showing you now
17 what has been marked as Exhibit I, it's
18 one page; do you recognize this
19 document?

20 A Yes.

21 Q Okay. Did you prepare this
22 document?

23 A Yes, I did.

24 Q Okay. And did you prepare it
25 on July 6, 2005 --

1 R. Miro

2 A Correct.

3 Q -- as the date appears on the
4 bottom right-hand side?

5 A Correct.

6 Q And it says "Baron," with one
7 R, "ATM Income Statement 2004" is that
8 an accurate description of what's shown
9 here?

10 A Correct.

11 Q Now, if you could just briefly
12 describe to me what's noted here?

13 A Okay. This is an income
14 statement for Barron ATM Corp. for 2004,
15 showing the revenues generated for those
16 machines for the 12-month period of
17 2004, and all the expenses associated
18 with that as well as a statement of net
19 cash used by Barron ATM Corp. showing
20 the cash deficit of \$95,789.

21 Q Now, when you prepared this
22 income statement -- is it fair to call
23 this a summary income statement?

24 A Yes.

25 Q -- did you use any back-up for

1 R. Miro

2 reference to obtain these numbers?

3 A Yes.

4 Q And did you do that from the
5 books and records of Barron ATM Corp.?

6 A Yes.

7 Q So the surcharge fees under
8 "Revenues," first column, those are the
9 actual transaction fees charged to
10 people who were taking money out of the
11 ATMs?

12 A Correct.

13 Q And the interchange fees come
14 from a bank --

15 A The network.

16 Q -- the network and that's a
17 payment that you described earlier?

18 A Transaction.

19 Q That's the only source of
20 revenue for Barron ATM?

21 A Correct.

22 Q And are these expenses that
23 are set forth below revenue, where did
24 these numbers come from?

25 A These were the actual expenses

1 R. Miro

2 that were paid on behalf of Barron ATM
3 Corp.

4 Q Now, were these all expenses
5 paid by the Mt. Vernon Money Center --

6 A Yes.

7 Q -- and then charged to Barron
8 ATM Corp.?

9 A Correct.

10 Q Were any of these charges for
11 items of service that were performed by
12 Mt. Vernon Money Center itself?

13 A Yes.

14 Q Which ones?

15 A Cash replenishment fees, first
16 line fees, second line fees, machine
17 transport, and accounting administrative
18 expenses.

19 Q Okay. Now it you see where it
20 says insurance --

21 A And insurance.

22 Q And insurance?

23 A I'm sorry, they were paid by
24 the Mt. Vernon Money Center.

25 Q Okay. But what I'm asking is

1 R. Miro

2 the actual service -- withdrawn.

3 Everything was paid by Mt.
4 Vernon Money Center; is that right?

5 A Right.

6 Q Okay. But the actual service
7 of cash replenishment to the machines,
8 was that a service that was actually
9 provided by Mt. Vernon Money Center to
10 Barron ATM Corp.?

11 A Yes.

12 Q And then it charged Barron ATM
13 Corp. this amount; is that right?

14 A Yes.

15 Q Okay. Were there any other
16 services that were performed directly by
17 the Mt. Vernon Money Center to Barron
18 ATM Corp. that are listed here as
19 expenses?

20 A Yes. The first line fees,
21 second line fees, accounting
22 administrative expense and machine
23 transport.

24 Q Okay. Could you tell me what
25 the first line fees means?

1 R. Miro

2 A First line is for repairs.
3 It's basically just for simple repairs,
4 for instance, if a machine jams you have
5 to send someone out.

6 Q Second line fees?

7 A Second line fees is where
8 you're going to have to remove parts and
9 stuff.

10 Q It's a different level of
11 service?

12 A Yes.

13 Q And you said parts and
14 supplies were also --

15 A Parts and supplies.

16 Q -- provided by Mt. Vernon?

17 A Paid for by Mt. Vernon.

18 Q But did it actually purchase
19 the parts and supplies and install them
20 in the machines --

21 A Yes.

22 Q -- as part of its first and
23 second line service?

24 A Yes, that's for the labor end
25 of it. The first and second line is the

1 R. Miro

2 labor charge.

3 Q And they provided
4 transportation for the machines; is that
5 correct?

6 A Right.

7 Q And then you said accounting
8 administrative expense that was provided
9 by Mt. Vernon Money Center or another
10 company?

11 A By the administrative company,
12 MVMM Corp.

13 Q Now, these other fees you
14 mentioned, were they all directly from
15 Mt. Vernon Money Center or MVMM Corp.?

16 A Be more specific.

17 Q In other words cash
18 replacement, what was the affiliate that
19 actually provided that?

20 A Mt. Vernon Money Center.

21 Q And first and second --

22 A Mt. Vernon Money Center.

23 Q So the only one in this list
24 that is MVMM is account and
25 administrative?

1 R. Miro

2 A Correct.

3 Q Under the line "For insurance"
4 where it says "250 per machine"?

5 A Correct.

6 Q That's the actual charge, you
7 individually count up the machines and
8 it's 250 each?

9 A Yes.

10 Q Is there an umbrella policy
11 that covered all the machines?

12 A Yes, there was.

13 Q So is that Mt. Vernon Money
14 Center's policy?

15 A Correct.

16 Q Do you know whether Barron ATM
17 Corp. was listed as an additional
18 insured?

19 A I believe it was.

20 Q Do you know whether the
21 machines themselves are itemized in the
22 insurance policy?

23 A You'd have to speak to Janet
24 Herman, she was in charge of that for
25 Mt. Vernon Money Center.

1 R. Miro

2 Q Okay. What is meant by "Reg E
3 claims"?

4 A Reg E claims are claims that
5 you pay out -- how do I explain that?
6 We have a transaction with the machine,
7 the bank comes -- the banks come to us
8 and tell us that the cash was paid out
9 -- we have a record that someone
10 requested to withdraw monies from the
11 bank, but they never got the money. You
12 go to an ATM machine make a withdrawal,
13 you get a receipt that says \$40 was
14 dispensed to that particular person but
15 they never actually got it, so under a
16 certain amount, I think it was \$20 or
17 so, we didn't spend the time to
18 investigate and we just paid it out.

19 Q "Interest to C. Sanford" on
20 the next line, does that represent the
21 interest calculation between principal
22 and interest on the note --

23 A Correct.

24 Q -- paid out in 2004; is that
25 right?

1 R. Miro

2 A Correct.

3 Q And "Depreciation," is that
4 depreciation on the individual ATM
5 machines?

6 A Correct.

7 Q And do you have any
8 understanding as to what's listed as
9 "MICS"?

10 A Miscellaneous expenses.

11 Q Do you know what that is?

12 A That is a catch-all for maybe
13 office supplies, maybe some postage,
14 little incidentals that aren't covered
15 in the line items up above.

16 Q Did Barron ATM Corp. purchase
17 its own supplies, stamps and things like
18 that or did it --

19 A It got it from MVMM Corp.

20 Q Did it actually purchase
21 individual items or was it an estimated
22 amount?

23 A As far as --

24 Q As far as office supplies,
25 postage, incidental items, was there an

1 R. Miro

2 actual transaction that took place
3 whereby Barron ATM Corp. would buy a
4 certain number of supplies or postage
5 from MVMM Corp.?

6 A No, it was just estimated,
7 there was no actual calculation, it was
8 just an estimate for this financial
9 statement.

10 Q So the estimate would have
11 been made at the time that you prepared
12 this?

13 A Yes.

14 Q And do you recall what you
15 based your estimate on?

16 A I don't recall at the time.

17 Q Do you recall now?

18 A From that time, I don't
19 recall.

20 Q All right. Now going again
21 below this column that ends in "Net
22 Income," you have "Cash Flows From
23 Barron"; is that right?

24 A Yes.

25 Q What does that mean?

1 R. Miro

2 A Okay. What I did was I tried
3 to -- I took the income statement and
4 adjusted it to show what actual cash --
5 I tried to determine how much cash was
6 -- the net cash, whether we had a
7 positive cash flow or negative cash flow
8 from Barron ATM Corp.

9 So I took the net income and I
10 adjusted, added back the noncash items
11 that represent the income statement,
12 which was depreciation. 18,599, that's
13 not really a cash transaction although
14 it is a valid line item for an income
15 statement, and at the same time the
16 income statement does not disclose the
17 principal paid on any notes.

18 So I had to adjust for that,
19 to show the actual cash that was used by
20 Barron ATM Corp., negative \$95,000,
21 based on the earnings, less expenses.

22 Q And that \$95,000 is actually
23 the very last line of this income
24 statement right, Net "Cash Provided/Used
25 By Barron" and it says a deficit of

1 R. Miro

2 \$95,789?

3 A Correct.

4 Q And that money, am I correct,
5 all constituted funds that were provided
6 by Mt. Vernon Money Center?

7 A Yes.

8 Q Did you ever prepare any other
9 income statements say for 2002, 2003
10 again for Barron ATM Corp.?

11 A I don't recall if I did or
12 not. I don't recall. I really don't
13 recall back that far, I might have, I
14 don't recall.

15 Q How about 2005?

16 A 2005, I don't believe -- I
17 don't know if I prepared a financial
18 statement in 2005, I don't know, I don't
19 remember. I might have. There might
20 have been a financial statement.

21 Q Do you remember who prepared
22 tax returns for Barron ATM Corp.?

23 A I wasn't involved in the tax
24 returns that would be -- Janet Herman,
25 the CFO, she would know when the returns

EXHIBIT D

1 R. Miro

2 discussing with him, was it a check, a
3 wire transfer?

4 A As far as where to send it
5 to -- in whose name to send it to and
6 where to send it to.

7 Q And do you remember what he
8 told you?

9 A Yes. I think we had sent him
10 some checks in the beginning and then he
11 had given me wire instructions, where to
12 wire the funds to.

13 Q Okay. So, would it be correct
14 to say that you spoke to him sometime
15 shortly before the first wire that you
16 sent out in payment?

17 A Yes.

18 Q And I notice on the
19 attachments to this letter that's
20 Exhibit A, starting on the third page --
21 the fourth page, excuse me, there are
22 three checks.

23 A Correct.

24 Q Now, these checks appear to be
25 drawn on the account of Mt. Vernon Money

1 R. Miro

2 Center's operating account.

3 A Correct.

4 Q And for the months of
5 October 1st, '02, November 1st, '02, and
6 December 1st, '02; is that correct?

7 A Right.

8 Q Did you have these checks
9 drawn?

10 A Could you be more specific.

11 Q In other words, were you
12 involved in having these checks
13 prepared?

14 A Yes.

15 Q Did you direct anyone to do
16 that?

17 A Yes, I directed -- actually I
18 was told by Mr. Egan to prepare the
19 checks and where to prepare the checks
20 from and then I instructed the accounts
21 payable department to draw the checks.

22 Q And were these checks drawn on
23 the dates that are referenced on the
24 checks or were they postdated?

25 A I believe these were